IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA;
DANIEL CHAUPE-ACUÑA;
JILDA CHAUPE-ACUÑA;
CARLOS CHAUPE-ACUÑA;
YSIDORA CHAUPE-ACUÑA, personally and on behalf of her minor child M.S.C.C.;
ELIAS CHAVEZ-RODRIGUEZ, personally and on behalf of his minor child M.S.C.C.;
M.S.C.C., a minor by his guardians YSIDORA CHAUPE-ACUÑA and ELIAS CHAVEZ-RODRIGUEZ; and
MARIBEL HIL-BRIONES;

Plaintiffs,

v.

NEWMONT MINING CORPORATION,
NEWMONT SECOND CAPITAL CORPORATION,
NEWMONT USA LIMITED, and
NEWMONT PERU LIMITED.

Defendants

Civil Action No. 17-1315-GAM.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF *FORUM NON CONVENIENS*

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I. NATURE AND STAGE OF THE PROCEEDING

In the present motion, Defendants, four Delaware corporations that head or are part of Newmont, a vast mining enterprise, claim it is inconvenient for them to litigate in their own home forum. Plaintiffs are Peruvian subsistence farmers and members of the same family. For more than twenty years, they have lived on and tried to make a living off of a small plot of land – Tragadero Grande. But they face one problem: their farm sits atop a gold deposit that Defendants covet. Defendants hope to build a vast, open-pit mine, in part on Tragadero Grande. To get the land, and the gold, Newmont has systematically abused Plaintiffs.

Since 2011, Defendants' agents have repeatedly invaded Tragadero Grande and harassed and intimidated Plaintiffs; they have dug up Plaintiffs' crops, stolen, maimed and killed their animals, and threatened and beaten Plaintiffs. They have also plied Peruvian government officials – including judges – with benefits so that their abuses go unchecked. Defendants claim that they have a competing right to the land where Plaintiffs live and farm, but rather than wait for the slow and congested Peruvian civil courts to resolve the land dispute, their agents continue to harass and intimidate Plaintiffs in the hope that they will pack up and leave. Plaintiffs have tried for years to seek relief in the Peruvian courts but Defendants' harassment continues.

On September 15, 2017, Plaintiffs filed suit in this Court because Defendants are at home here. They subsequently sought a preliminary injunction to halt Defendants' agents' harassment, which has continued even *after* Plaintiffs filed suit in this Court. D.I. 27. But rather than defend themselves in their home forum, Defendants have asked this court to dismiss Plaintiffs' suit under *forum non conveniens* (FNC) and send it back to Peru, where Defendants know Plaintiffs will not get a fair shake and where Defendants have a history of corrupting judicial officials. Plaintiffs now submit this brief in Opposition to Defendants' Motion to Dismiss on the Grounds of *Forum Non Conveniens*.

II. SUMMARY OF ARGUMENT

Defendants' agents continue to intimidate Plaintiffs even during this action. To preserve the *status quo*, this Court should rule on Plaintiffs' pending Motion for Preliminary Injunction, D.I. 27, immediately, and not give Defendants free rein to commit more torts while it decides FNC.

Defendants seek an exceptional remedy, *forum non conveniens* dismissal, but have not met their heavy burden of proof. They cannot prove that Peru is an adequate alternative forum. They fail to show that a Peruvian court will accept jurisdiction over them. And their local subsidiary's history of bribing judicial officers belies any assertion that Plaintiffs will receive a fair trial.

Even if Defendants could overcome their threshold burden to show Peru is an adequate forum, they still must show that the relevant private and public interest factors favor dismissal, but they cannot. Plaintiffs sued Defendants in their home jurisdiction, where they chose to incorporate. That choice is entitled to deference.

Defendants claim that all the evidence and witnesses are in Peru, but that too is false. Plaintiffs' claims turn on Defendants' – and their officers' and directors' – conduct and control over their agents. Evidence regarding this conduct is in the U.S., where Defendants have their offices.

Defendants wrongly assert that this tort action is really a land dispute that requires this Court to determine the ownership and possession of Tragadero Grande. As Defendants acknowledge, ownership will be decided in ongoing Peruvian litigation. That dispute is irrelevant here, because Defendants' local subsidiary's claim to own the land, even if ultimately vindicated, does not justify their harassment and intimidation of Plaintiffs; indeed, at present, the Peruvian court has determined that Plaintiffs possess their farm – eviscerating Defendants' claim of a "possessory" defense.

III. STATEMENT OF FACTS

Defendants, Newmont Mining Corporation (NMC) and its subsidiaries, Newmont USA Ltd., Newmont Peru Ltd., and Newmont Second Capital Corp. (together, "Newmont"), are all

Delaware corporations. D.I. 27, Ex. 9 at 21, Ex. 50 at 24. Through their agents, Defendants are trying to force Plaintiffs from their farm to build a gold mine called Conga. D.I. 28 at 4.

Plaintiff Máxima Acuña-Atalaya, along with her husband, Jaime Chaupe Lozano, purchased the right to possess Tragadero Grande in 1994. D.I. 27, Ex. 1 ¶ 2.[1] Máxima, Jaime, and their family have lived and farmed there ever since. D.I. 28 at 3-4. But since at least August 2011, Defendants, through their agents Minera Yanacocha's (MY) security, have threatened, beaten, and terrorized Plaintiffs. D.I. 28 at 3-7. They have invaded Plaintiffs' farm at least nineteen times – with swarms of men armed with batons – destroying property, entering the Chaupes' house, digging up crops, and killing their sheep and other animals. *Id.* at 5-6. They blinded one of Plaintiffs' pet dogs in one eye and stabbed another. *Id.* Defendants' agents have threatened, filed false criminal complaints against, spread false rumors about, and attempted to extort Plaintiffs. *Id.* Plaintiffs constantly fear for their ability to make a living, and for their lives. *Id.* at 5-6.

MY has admitted, in a report NMC commissioned by the consulting group, RESOLVE, that it has attempted to evict the Chaupes and destroyed their crops and buildings. Ex. 16 at 33. The report found that "the human rights of members of the family have been at risk since the first Tragadero Grande eviction attempt." Ex. 16 at 35. The Inter-American Commission on Human Rights has recognized that Plaintiffs "have been the object of continuous acts of harassment and threats, with the intent to allegedly dislodge them from the land where they live." Ex. 44 ¶ 24.

MY disputes the Chaupes' ownership of Tragadero Grande, and that dispute is currently being litigated in Peru. D.I. 28 at 4. But Defendants do not trust the Peruvian civil courts to resolve the issue swiftly, D.I. 37-12, so they undertake their own incursions onto the land to harass the Chaupes. D.I. 28 at 7. Less than a month after Plaintiffs filed this Complaint, Defendants' agents

[1] Unless otherwise noted, exhibits are attached to the Declaration of Maryum Jordan in Support of Plaintiffs' Motion for Preliminary Injunction, D.I. 26-28. To avoid repetition, Plaintiffs refer where possible to that motion, which contains additional detail and cites extensive supporting evidence.

again invaded Tragadero Grande and destroyed the Chaupes' crops. D.I. 28, Ex. 60.

From the United States, Defendants oversee the agents responsible for these incursions and abuses. NMC is the majority owner of MY, through NMC's subsidiary Newmont Second Capital Corporation. Ex. 9 at 21; Ex. 50 at 24. Newmont USA Ltd. employs Newmont's Regional Security Director, who is responsible for security at Conga. Ex. 26 at 18:10-22; 136:1-5. Newmont Peru Ltd. is a single entity with Newmont Peru S.R.L., which is MY's manager, "responsible for managing, conducting and controlling the day-to-day operations of Yanacocha." Ex. 33 at 49, 93.

Defendants' agents have plied Peruvian judicial officials with money and favors to procure favorable outcomes in Peru. Declaration of Mirtha Esther Vásquez Chuquilín ("Vásquez Decl.") ¶ 25. Defendants have hired relatives of local officials and court workers. *Id.* ¶¶ 27, 33. Widely publicized scandals have revealed allegations of various corruption schemes involving Defendants and the Peruvian judiciary. D.I. 1 ¶52; Declaration of Marissa Vahlsing ("Vahlsing Decl.") ¶¶ 9-11. Defendants' agents have used their influence to induce prosecutors in Peru to bring unsubstantiated criminal charges. Declaration of Mirtha Esther Vásquez Chuquilín ("Vásquez Decl.") ¶¶ 28-31. Indeed, the judge who ruled for MY in one of these cases admitted in open court that she had been pressured by MY. D.I. 27-1 at 52 ¶¶ 7, 8.

IV. ARGUMENT

A. The Court should decide the preliminary injunction before FNC because Plaintiffs are in urgent need of protection.

Defendants continue to abuse the Chaupes, even after Plaintiffs filed their preliminary injunction motion. And Plaintiffs' preliminary injunction motion demonstrates that interim relief is warranted. Defendants' FNC motion does not challenge the merits of Plaintiffs' claims. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007). And although the Motion does not challenge jurisdiction either, *id.*, a court's duty to preserve the *status quo* is so compelling that a court may issue a preliminary injunction even before determining its own jurisdiction. *United States v. United*

Mine Workers, 330 U.S. 258, 290, 292-293 (1947). This Court should not let Newmont continue to terrorize the Chaupes while Defendants' FNC motion is pending. *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (*en banc*) (upholding district court's refusal to consider *forum non conveniens* motion before issuing a preliminary injunction).[2]

B. Defendants cannot meet their heavy burden to justify FNC dismissal.

Dismissal for *forum non conveniens* "is the exception rather than the rule." *Lacey v. Cessna Aircraft Co.,* 862 F.2d 38, 45-46 (3d Cir. 1988). FNC is "an exceptional tool to be employed sparingly…[.]" *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (overturning FNC dismissal of indigenous Peruvians' personal injury action against California oil company).

Defendants' burden of persuasion on a FNC motion is "heavy." *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d 288, 294-95 (3d Cir. 2010); *Lacey,* 862 F.2d at 43-44. Defendants must show: 1) that Peru is an adequate alternative forum that can hear Plaintiffs' case; 2) that Defendants can overcome the deference that Plaintiffs' chosen forum deserves; and 3) that the relevant public and private interest factors indicate that trial in Defendants' home state of Delaware would "result in oppression or vexation to the defendant out of all proportion to the plaintiffs' convenience." *Windt v. Qwest Communs. Int'l, Inc.,* 529 F.3d 183, 190 (3d Cir. 2008). Plaintiffs' choice of forum "should rarely be disturbed"; Defendant[s] must show that the balance of the public and private factors "is strongly in [their] favor." *Lacey,* 862 F.2d at 43, 48 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.8 (1981)). Defendants have not met their heavy burden here.

C. Peru is not an adequate, alternative forum for these claims.

Defendants must show Peru is an available and adequate forum where they are subject to jurisdiction. *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013). They have not.

[2] Plaintiffs' preliminary injunction reply brief will explain in more detail why the preliminary injunction motion should be decided first.

Defendants fail to show that a Peruvian court will exercise jurisdiction over these Delaware companies, and they cannot show that Peruvian courts will be impartial to these Plaintiffs. Defendants neglect to mention that their own prior attempt to dismiss a lawsuit for FNC in favor of a Peruvian forum – litigated by their same defense counsel – was overturned on appeal by the Colorado Court of Appeals, because the lower court had not considered whether it was "possible to bring all defendants before a Peruvian court," and whether "[Newmont's] influence with Peruvian judicial officers was such that plaintiffs could not expect to get a fair treatment by Peruvian courts." *Alberto Achas Castillo v. Newmont*, No. 02CA1772, 2003 WL 25485554 (Colo. App. Nov. 13, 2003).[3] Defendants settled the claims in *Castillo* rather than answer those questions on remand; and they cannot satisfactorily answer them here. Vahlsing Decl. ¶¶ 12-15, Exs. 5-11.

1. Peru is not an available forum because there is substantial doubt as to whether a Peruvian court would have jurisdiction over Defendants.

If the foreign forum "cannot exercise jurisdiction over the defendant, it is not an available forum." *Francois v. Hartford Holding Co.*, No. 2000/0112, 2010 U.S. Dist. LEXIS 44115, at *6 (D.V.I. May 4, 2010). Defendants have not shown that "all defendants" are subject to jurisdiction in Peru, which bars dismissal, *see PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998); they admit that only *one* Defendant "may" be subject to jurisdiction in Peru. D.I. 15 at 5. Instead, they claim that their offer to stipulate to jurisdiction suffice. D.I. 15 at 5-6. They are mistaken.

Under the Peruvian Code of Civil Procedure, courts only have jurisdiction over a foreign

[3] The Peruvian Plaintiffs in *Castillo v. Newmont* submitted a "voluminous" record of Newmont's improper influence over the Peruvian judiciary to the Colorado Court of Appeals in order to defeat an FNC dismissal. There, Plaintiffs "presented the transcript of an audiotape of a conversation between a representative of Newmont and a Peruvian official, confirming an arrangement to have another claim against Newmont favorably resolved, as well as evidence of payments to members of [the] Peruvian judiciary to benefit Newmont in other litigation." Vahlsing Decl. ¶ 12, Ex. 8. Appellants' Opening Brief, at 9, *Alberto Achas Castillo v. Newmont*, No. 02CA1772 (Colo. App. Nov. 13, 2003). Plaintiffs understand that the record in *Castillo* is under seal. Defendants should not be permitted to contest these points without producing this evidence.

corporate defendant in limited circumstances, which are not met here. Declaration of Juan Carlos Ruiz Molleda ("Ruiz Decl.") ¶¶ 4-14. Stipulation cannot cure this, because personal jurisdiction is a matter of public order and there is substantial doubt that it could be consented to by private parties in tort suits. *Id.* Additionally, it is contrary to public policy for a Peruvian court to dismiss the chosen forum of a plaintiff in favor of a defendant's preference. *Id.* No Peruvian court has exercised jurisdiction over a foreign corporation, including ones that have stipulated to jurisdiction. *Id.* Peru cannot be considered an available forum.

2. Peru is not a fair and impartial forum for these Plaintiffs' claims.

A forum is inadequate when the particular defendants would have improper influence over the judiciary. *See Daventree Ltd. v. Republic of Azer.*, 349 F. Supp. 2d 736, 756 (S.D.N.Y. 2004). In particular, where there is evidence that defendants have *already* manipulated the justice system and would likely continue to use its influence were the case sent there, the foreign forum is inadequate. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-86 (S.D. Fla. 1997).

As in *Eastman Kodak*, Plaintiffs cannot rely on Peruvian courts, not only because of the widespread pattern of judicial corruption, but also because there is evidence that Defendants already improperly influenced the Peruvian judiciary, including in claims involving these Plaintiffs. Plaintiffs allege that Defendants bribed local judicial officials in Peru in order to bring false criminal charges against them. Vásquez Decl. ¶¶ 28-31. And Plaintiffs have provided an extensive record of corruption within the Peruvian judiciary and Defendants' agents' role in bribing judges. *See* Ruiz Decl. ¶¶ 15-22; Vahlsing Decl. ¶¶ 9-18; Vásquez Decl. ¶¶ 11-14, 25-33; D.I. 27-1 at 52 ¶¶ 7, 8.

Since at least the commencement of the Yanacocha mine operation in 1993, Defendants' agent, Minera Yanacocha (MY), has exerted substantial influence over Peruvian officials, including the Peruvian judiciary and the Cajamarca courts. Vahlsing Decl. ¶¶ 9-11; Vásquez Decl. ¶¶25-33.

Defendants' influence over the Peruvian government has also prevented Plaintiffs from

obtaining adequate protection. Plaintiffs have filed ten complaints against Minera Yanacocha with the local prosecutor's office, but the prosecutors have never made any effort to investigate these complaints or to conduct inspections. Vásquez Decl. at ¶¶ 11-13. Judicial officials have even failed to adhere to proper judicial processes and will cancel on-site inspections without notice. *Id.* Instead, the same prosecutor's office filed criminal charges against Plaintiffs. *Id.* at ¶¶ 28-31.

The fact that Peru has been found to be a suitable forum for other cases, D.I. 15, matters little. "[E]ach [FNC] case turns on its facts." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, (1988). Plaintiffs do not argue that Peru's courts are *generally* inadequate. The question is whether Peru affords an adequate forum for *these* Plaintiffs' claims against *these* Defendants. The answer is "no."

Defendants argue that Peru is an adequate forum because a few decisions against Plaintiffs have been reversed on appeal. D.I. 15 at 8-9. But Plaintiffs need not prove that they can *never* win. They do not bear the burden at all. Even if Plaintiffs might win on appeal, a forum is inadequate if, to prevail, Plaintiffs must swim against a tide of lower court corruption. The Cajamarca judiciary's susceptibility to corruption and Minera Yanacocha's history of corrupting the Peruvian judiciary disqualifies Peru as an adequate forum. *See Eastman Kodak Co.*, 978 F. Supp. at 1085-1086.

The fact that a Peruvian court has already held unfair trials against Plaintiffs – indigenous *campesinos* – makes it even more unlikely that Plaintiffs would have a fair day in court in Peru on these claims. Vásquez Decl. ¶¶ 29-33. During the proceedings at the local court in Celendin for the false criminal charges Minera Yanacocha filed against Plaintiffs, Plaintiffs' attorney was not permitted to present any evidence or access a court opinion. *Id.* at ¶ 29. The prosecutors presented no legal arguments; they only insulted Plaintiffs and called them uneducated and ignorant and mocked Máxima's illiteracy. Vásquez Decl. ¶ 29.

Finally, where foreign litigation would be subject to "excessive delay," *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995), the forum is inadequate. Peruvian courts are so

chronically overworked, understaffed, and besieged with national strikes that the judges complain about it in their opinions.[4] Fernandez Decl. ¶¶ 48-51. Defendants themselves assert they resort to their purported possessory defense because Peruvian civil courts are too slow. D.I. 37 at 12.

D. Plaintiffs' decision to sue Defendants "at home" is entitled to deference.

A plaintiff's choice of forum is entitled to deference, and ordinarily will not be disturbed. *Piper Aircraft Co.*, 454 U.S. at 241. Defendants note that foreign plaintiffs' forum choice may receive less deference than domestic plaintiffs', D.I. 15 at 14, but this Court must afford "the deference due to U.S. plaintiffs" because a U.S.-Peru treaty "explicitly provide[s] for national access" to U.S. courts by Peruvians. *Windt v. Qwest Communs. Int'l, Inc.*, 544 F. Supp. 2d 409, 418 n.13 (D.N.J. 2008).[5]

Even absent such a treaty, this is "not an invitation to accord a foreign plaintiff's selection . . . no deference, since dismissal for *forum non conveniens* is the exception rather than the rule." *Lony v. E. I. Du Pont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir. 1989) (citation omitted). Even in cases involving a foreign plaintiff, defendants still must establish "a strong preponderance in favor of dismissal." *Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d 604, 609 (3d Cir. 1991). And non-resident plaintiffs can increase deference, including to the full measure ordinarily afforded, by showing that their forum choice was based on convenience. *Windt v. Qwest Commc'ns Int'l, Inc.,* 529 F.3d 183, 190 (3d Cir. 2008). This showing can be made by demonstrating that plaintiffs sued in the defendants' home forum because jurisdiction there was likely. *Lony*, 886 F.2d at 634. Plaintiffs' decision to sue in defendants' home is particularly logical where "the defendant[s'] amenability to suit in the plaintiff[s'] home district is unclear." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72-73 (2d

[4] D.I. 27, Ex. 42 at 10 ("[A]s the 3 Court clerks have a docket of more than 50 cases to rule on and resolve, along with the 8 to 10 daily hearings . . . especially if this court does not have an assistant to support its work, and also following the 24, 48 and 72-hour work stoppages, the indefinite national strike among Judicial Branch employees, and the court recess in the month of February.").
[5] *See* Treaty of Friendship, Commerce and Navigation, Peru-U.S., art. XV, Aug. 31, 1887, 25 Stat. 1444), *available at* https://www.loc.gov/law/help/us-treaties/bevans/b-pe-ust000010-1057.pdf (Peruvians must receive "open access" to U.S. courts "on the same terms" as U.S. citizens).

Cir. 2001). Here, all four Defendants are incorporated and subject to jurisdiction in Delaware, D.I. 17 ¶¶ 2-5, whereas jurisdiction in Peru is in doubt.

The Supreme Court recently clarified that a corporation is "at home" in the two places that provide "paradigmatic" bases for general jurisdiction: its place of incorporation and its principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 & n.19 (2014). In these places, Plaintiffs are afforded "recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d 572, 582 (D. Del. 2015) (quoting *Daimler* at 760). Defendants, "having received the benefits of Delaware incorporation, should not now complain that [plaintiffs] chos[e] to sue [them] here." *McKee v. PetSmart, Inc.*, No. 12-1117, 2013 U.S. Dist. LEXIS 38185, at *9 (D. Del. Mar. 20, 2013). Plaintiffs' legitimate basis for choosing Delaware as a forum is entitled to deference.

Defendants' argument that it would be more convenient for them to defend themselves thousands of miles away from their home should be viewed with skepticism. NMC has been a Delaware corporation for nearly 100 years. D.I. 27, Ex. 9 at 3. If Defendants were truly interested in convenience, they would have suggested transfer to Colorado – their principle place of business. D.I. 17 at ¶¶ 2-5. Instead, Defendants raise FNC, likely because "the current application of FNC by U.S. courts, before which Latin American plaintiffs have asserted their claims, frequently serves only one end: dismissal of those plaintiffs' claims." E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 Law & Bus. Rev. Am. 11, 11 (2007) (noting that only one of more than fifty personal injury actions dismissed under FNC was actually tried in the foreign forum). Knowing this, Defendants would have this Court send Plaintiffs down the same path as the Plaintiffs in *Chavez v. Dole Food Co.*, 836 F.3d 205, 211-12 (3d Cir. 2016) (*en banc*). There, Latin American agricultural workers sued Dole in Texas; and Dole won an FNC dismissal in 1995,

sending the plaintiffs back to their home countries. But by the mid-2000's "it had become clear that foreign courts were . . . unwilling to hear these cases." *Id.* The *Chavez* plaintiffs returned to Texas to seek permission to refile, which Dole challenged. For twenty-four years, no court had heard plaintiffs' claims until the Third Circuit finally allowed them to move forward, commenting "as these cases come to us today, there is a serious possibility that no court will ever reach the merits of the plaintiffs' claims. More than twenty years after this litigation began, we think that outcome is untenable[.]". *Id.* at 210-11. Defendants' attempts to dismiss these claims to a jurisdiction where they are not at home would all but guarantee unending litigation, including in the United States. Other courts have rejected this gambit. *See Carijano*, 643 F.3d at 1231-32. It should not be repeated here.

Even if Plaintiffs could get their case fairly heard in Peru, and prevail, they may face difficulties enforcing a judgment. While Plaintiffs believe there is no practical difference between MY (which obviously has substantial assets in Peru) and these Defendants, Newmont has taken the opposite position. That raises the possibility that Defendants would resist enforcement of a judgment there and force Plaintiffs to return to a U.S. court – a risk Plaintiffs should not be forced to bear, and that does not arise in Delaware. Judicial economy weighs heavily against FNC if plaintiffs would be required to return to the U.S. to enforce a judgment. *See Lexington Ins. Co. v. Forrest*, 263 F. Supp. 2d 986, 995 (E.D. Pa. 2003); *see also Carijano*, 643 F.3d at 1231-32.

E. Defendants fail to meet their burden under Delaware FNC law, which applies to these diversity claims.

Newmont's motion assumes that federal FNC law applies, but these are diversity claims; the Supreme Court and the Third Circuit have both declined to decide whether state FNC law applies in diversity actions. *E.g. Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n.13 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *Lacey*, 862 F.2d at 42 n.7. This Court need not resolve this issue, because Defendants' FNC motion fails under either standard. But if there is any doubt, under Delaware law – under which Newmont must show "that being required to litigate in Delaware would subject it to

overwhelming hardship," *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 999 (Del. 2004) – FNC dismissal clearly must be denied, and Delaware law should apply.[6]

F. The private interest factors favor suit in Delaware.

Defendants cannot show that litigating in their home state would be vexatious and oppressive to them, let alone that such harms would be out of all proportion to Plaintiffs' convenience. *Piper Aircraft Co.*, 454 U.S. at 241.

1. Substantial relevant evidence is located in, and accessible from, the United States. Defendants' claim that "almost every witness, and nearly all documentary and physical evidence necessary to litigate this case, are in Peru" is wrong. D.I. 15 at 12. Plaintiffs' claims concern Newmont's exercise of control over their agents in Peru; that control is exercised from the United States. Section III, *supra*; D.I. 28 at 11-17; D.I. 27, Exs. 54-58. Newmont's Security Director for the Americas, Otto Sloane, lives in the U.S. and directly oversees MY's Security Manager. D.I. 27, Ex. 26, 19:6-14.[7] Key evidence and witnesses regarding Defendants' corporate structure and their involvement in Conga's security operations are likely to be located in the U.S. where they are incorporated and headquartered. This includes documents concerning internal operations, management structures, job descriptions of employees in the U.S., and internal operating policies, including NMC's Security and

[6] Though there is a circuit split on this issue, *compare Weiss v. Routh*, 149 F.2d 193, 195 (2d Cir. 1945), *with In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987), the Supreme Court has indicated that state law should apply where failure to do so would frustrate *Erie*'s "twin aims" of "discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), and no "countervailing federal interests prevent the state law from being applied." *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 262 (3d Cir. 2011). The Supreme Court has also suggested that federal interests in uniformity are quite weak with respect to FNC: "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1995). Indeed, one court in this Circuit has applied state FNC law in a diversity case. *Baltimore & Ohio R.R. Co. v. Halchak*, 71 F. Supp. 224, 226 (W.D. Pa. 1947). Plaintiffs would be happy to brief this question further if necessary.

[7] Key NMC and Newmont USA Limited personnel direct and are involved in Conga's security from the U.S. *See* D.I. 28 at 11-17; D.I. 27, Ex. 16 at 3-4; D.I. 27, Ex. 13 at 7, 17.

Human Rights Standard. This favors litigation in Delaware, or at most makes the accessibility of evidence a neutral factor. *Sandvik AB v. Advent Int'l Corp.,* 83 F. Supp. 2d 442, 450 (D. Del. 1999).

Defendants understate how much evidence regarding their Conga activities is in the United States. In 2015, NMC and Newmont USA Ltd. produced over a thousand pages of documents concerning Conga from their U.S. offices in another matter involving the Conga project. *Álvarez v. Newmont Mining Corp.*, No. 1:14-cv-00208, 2015 U.S. Dist. LEXIS 31916, at *6 (D. Colo. Mar. 16, 2015);[8] Vahlsing Decl. ¶¶ 2-8. The production was almost entirely in English and included documents, spreadsheets, photographs, emails between staff in Peru and Defendants' employees in the U.S. regarding the situation in Peru, Conga security plans and reports, and photos and video surveillance of community activists in Cajamarca. *Id.*; D.I. 27, ¶¶ 27-28, Exs. 23-25. The documents refer to a Newmont intranet, suggesting that Conga security documents, video footage, and other data are accessible from the U.S. D.I. 27 Ex. 21 at 502-505, 524, 527. There is no question key evidence relating to Conga is here; if it is not, Defendants have easy access to it.

2. Key witnesses also reside in the U.S. and/or may be compelled by notice. Defendants are all present in Delaware, and their directors, officers, and managing agents all may be compelled by notice. *Jules Jordan Video, Inc. v. 144942 Canada Inc.,* 617 F.3d 1146, 1158 (9th Cir. 2010); *Dempsey v. Bucknell Univ.,* No. 4:11-CV-1679, 2013 U.S. Dist. LEXIS 135199, at *9 (M.D. Pa. Sep. 23, 2013). The majority of these individuals reside in the U.S. D.I. 28 at 10-18; D.I. 27 Ex. 10-13, Ex. 28, 54-58. Each Defendant's corporate representative for Rule 30(b)(6) depositions likely resides in the U.S.

Relevant directors, officers and managing agents who do not reside in the U.S. are also compellable by notice. *See e.g. E.I. DuPont de Nemours & Co. v. Kolon Indus.*, 268 F.R.D. 45 (E.D. Va.

[8] The evidence was produced pursuant to an application for discovery filed by Elmer Eduardo Campos-Álvarez, who was shot and paralyzed by Peruvian police under contract with Minera Yanacocha, while protesting at the Conga mine site; the application sought evidence to support a criminal investigation and civil action relating to his injury. Vahlsing Decl. ¶ 3.

2010). This includes, for example, Javier Velarde Zapater, D.I. 27, Ex. 28 at 3, who is central to the Chaupe matter and has already declared his willingness to testify in this Court. D.I. 16 at 2. Other relevant witnesses who may not reside in the U.S. but who may be compelled by notice include NMC Senior Vice President, South America, who is an NMC senior officer. D.I. 27, Ex. 28 at 3. Defendants apparently concede witnesses under their control will be willing or compellable witnesses. D.I. 15 at 14-15.[9] Key third-party witnesses in the U.S., including RESOLVE, NMC's former Senior Security Director, and Defendants' former employees can be deposed pursuant to Rule 45, but not easily compelled to testify in Peru. Fernandez Decl. ¶ 38; Perez Decl. ¶ 13.

3. Defendants have not shown that relevant witnesses are unwilling to testify; the Court should give little weight to this factor. Defendants' assertions about the inability of a U.S. court to compel unwilling witnesses are purely speculative and should be discounted. The movant bears the "burden to show" that "witness[es] [are] unwilling to testify and that compulsory process [i]s consequently needed." *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2005). Where, as here, the movant fails to do so, "a district court should not attach much weight to the compulsory process factor." *Id.* Defendants have not given the district court "enough information to conclude that some witnesses should be categorized as unwilling." *Id.* They merely state in their brief that relevant witnesses in Peru "are unlikely to be willing to travel." *See* D.I. 15 at 13. This unsworn speculation is not enough. *See Duha*, 448 F.3d at 877. Indeed, willingness to travel is not the question; third-party witnesses can be deposed, and have trial depositions taken, in Peru *without* traveling here. Defendants have not suggested that relevant witnesses would be unwilling to *testify*. And if any are unwilling, Peruvian law allows for courts in the United States to compel witnesses and documents from Peru, Fernandez Decl. ¶ 38, and U.S. courts can subpoena U.S. citizens abroad directly. 28 U.S.C.S. § 1783.

[9] Defendants have demonstrated this is the case by filing Declarations from Newmont Peru S.R.L., MY and Securitas personnel, as well as a former MY employee, in their opposition to the motion for preliminary injunction. *See* D.I. 38, Exs. 8, 9, 13, 15, 17.

4. Defendants misstate the costs of obtaining the testimony of willing witnesses. Defendants cite the costs of bringing witnesses to the U.S., but ignore the costs of bringing to Peru the many witnesses located here should the Complaint be dismissed on FNC. And they overstate the expense of obtaining testimony from Peruvian witnesses. If Newmont is concerned about the cost of its own lawyers traveling to Peru, the parties can agree and the Court can order that depositions proceed by video or telephone. Fed. R. Civ. P. 30(b)(4). In any forum, obtaining testimony incurs costs – but Newmont has not shown litigating in Delaware is so much more expensive than litigating in Peru as to make Plaintiffs' choice of Newmont's home forum oppressive or vexatious.

5. The Court does not need to see Tragadero Grande. Defendants repeat their false claim that ownership and possession of Tragadero Grande – rather than physical attacks and intimidation – "forms the basis" of this dispute, and add the *non sequitur* that the Court would need to visit Tragadero Grande. D.I. 15 at 15. But this action does not require this Court to opine on ownership, and a site visit is unnecessary to adjudicate the physical attacks and intimidation at issue. Nor would access to the site be necessary to enforce compliance with a remedial decree. Even courts monitoring compliance with their judgments, including those that apply abroad, generally do not perform on-site inspections; they rely on evidence submitted in court, "no matter where any acts occur or property is located." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1531-32 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985).

6. Practical problems favor litigating this matter in Delaware. Defendants' argument that "a trial in Delaware would require the extensive use of translators," D.I. 15 at 16, does not weigh against Plaintiffs' chosen forum. Translation is relevant, but under *Lony*, 886 F.2d at 640, the case Defendants cite, when both fora would need evidence and testimony to be translated, and the balance does not strongly favor either side, this factor is neutral. A significant portion of relevant documents are in English. Vahlsing Decl. ¶¶ 5, 6. And witnesses in the U.S. would need translation

in Peru; for example, Newmont's Security Director for the Americas does not speak Spanish. *Id.*

On the other hand, litigation in Peru would present significant practical obstacles. Fernandez Decl. ¶¶ 29-55. Courts in Peru allow but do not easily accept foreign evidence. *Id.* Perez Decl. ¶ 13. Indeed, Defendants and their agents have used these obstacles to thwart litigants who attempt to introduce evidence produced from the U.S. in Peru. Vahlsing Decl. ¶¶ 7,8. Moreover, Peruvian courts do not allow immediate family members to testify regarding another family member's claims. Fernandez Decl. ¶¶ 41-45. This would substantially prejudice Plaintiffs – who are all members of the same family – were they forced to litigate this action in Peru.

Defendants' hypothetical inability to implead Securitas or PNP merits no weight. D.I. 15 at 15. Without affirmative evidence of an intent to implead, the Court should not consider this factor. *Lacey*, 862 F.2d at 45. Defendants have not declared any intent to implead anyone. Regardless, Defendants can later seek indemnification. *Lehman v. Humphrey Cayman, Ltd.,* 713 F.2d 339, 343-44 (8th Cir. 1983). In fact, Defendants' agent, MY, has a contract with Securitas that includes an indemnification clause. D.I. 27, Ex. 36 at 19.[10]

7. A Delaware judgment is easily enforceable; a Peruvian judgment may not be. Because Defendants are not present in Peru, Plaintiffs may have to return to the United States to try to enforce any Peruvian judgment against them. This factor strongly favors Plaintiffs. Defendants' claim that it may be hard for Plaintiffs to enforce an injunction issued by this Court is meritless. D.I. 15 at 16. Plaintiffs seek only to enjoin the acts of U.S. Defendants, and persons and entities subject to Defendants' control. *See* D.I. 28. Surely Defendants are not suggesting that they will ignore this Court's orders. The locus of the intimidation and harassment campaign that the requested injunction would stop is immaterial. A district court "may command persons properly before it to cease to perform acts outside its

[10] The contract provides that Securitas shall "defend and safeguard Yanacocha, its subsidiaries and affiliates and its directors, officials, employees and respective agents against any and all losses, claims, actions, judgments" connected to services rendered.

territorial jurisdiction." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1363-64 (9th Cir. 1988)(*en banc*) (quoting *Steel v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952)); *accord Ramirez de Arellano*, 745 F.2d at 1529. Control over security at Conga lies with the U.S. Defendants; the injunction may be directed towards these entities. This factor favors Plaintiffs.

8. Plaintiffs cannot get a fair trial in Peru. Defendants' claim that a fair trial will be more difficult to obtain in this Court than in Peru is absurd. D.I. 15 at 16-17. Plaintiffs have never bribed a U.S. judge; Newmont cannot say the same about their agents in Peru. *See* IV.C.2, *supra*. If this action is sent to Peru, Plaintiffs will be denied a fair trial – and indeed any trial against these U.S. Defendants at all. Section IV.C., *supra*.

G. The public interest factors do not favor disturbing Plaintiffs' choice of forum.

Defendants also fail to show that the public interest factors "weigh heavily on the side of dismissal." *Lacey*, 862 F.2d at 44.

1. Local interest here is strong. The local interest factor favors keeping this case in Delaware. Newmont chose to incorporate here, and has stayed for almost 100 years. D.I. 27, Ex. 9 at 3. While Newmont dismisses its Delaware status as irrelevant, D.I. 15 at 19, it "should not be disregarded lightly." *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 821 F. Supp. 962, 965 (D. Del. 1993). Delaware has a strong interest in "ensuring that businesses incorporated or operating within its borders abide by the law." *Lony*, 886 F.2d at 641; *see also McLennon v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 425 (5th Cir. 2001). And Delaware has a "significant" interest in providing a "neutral forum" for "disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." *Candlewood Timber,* 859 A.2d at 1000.

Defendants point to the Peruvian executive branch's involvement in the Chaupe matter and the Conga project generally to show Peru's "interest" in this case, D.I. 15 at 18, but Peru's anemic response to Defendants' abuse proves either disinterest or bias in Newmont's favor. Peru's

government did not lift a finger to protect the Chaupes for five years after Defendants started abusing them, even though Minera Yanacocha hired the national police to participate in its intimidation campaign against Maxima and her family. D.I. 27, Ex. 38. Only after the Inter-American Commission on Human Rights found the Chaupes were entitled to government protection did Peru do anything, and even then it merely promised to send police to Tragadero Grande twice a month, to pay the family's phone bill so it can call the police, and to coordinate with the police on a protection plan for Plaintiffs. D.I. 1 at ¶ 350-51; D.I. 27, Ex. 44. The government has not adopted any such plan. D.I. 1 at ¶ 351; D.I. 27, Ex. 60; D.I. 28 at 7. Instead, on October 9, it authorized a new contract between the police and Minera Yanacocha. Ruiz Decl. ¶ 6.

Peru is not serious about ending the abuse. Vásquez Decl. ¶¶ 18-24. Newmont's agents know this, and continue to harass the Chaupes. Even if Peruvian authorities were protecting the Chaupes, that would not prove any special interest; it would simply mean they were doing their job. This is hardly the local "interest" that should be relied upon to send this case to Peru.

2. Delaware jurors are appropriate here. Delaware has strong interests in ensuring that its corporations follow the law and in providing a forum to adjudicate disputes about them. Delaware jurors would not be unfairly burdened by considering the conduct of these Delaware corporations.

3. Administrative difficulties favor Delaware. The relative court congestion in each forum favors keeping this case in Delaware. "[A] plaintiff may choose Delaware based on the court's light docket and relatively quick case disposition time"; that choice "is legitimate and rational and thus entitled to deference." *Joint Stock Society v. Heublein, Inc.*, 936 F. Supp 177, 187 (D. Del. 1996); *accord Intel Corp. v. Broadcom Corp.*, 167 F. Supp. 2d 692, 706 (D. Del. 2001). Indeed, while Plaintiffs recognize the challenges posed by two vacancies in Delaware, the problem pales in comparison to the difficulties afflicting the Peruvian courts. *See* Section IV.C.2, *supra.*[11]

[11] The only support that Defendants offer for their claim about relative court congestion is a quote

4. Newmont has not shown that Peruvian law applies. Because Defendants have utterly failed to meet their burden of proof, this factor favors a Delaware forum. Delaware's choice of law rules apply in this diversity action. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under those rules, if the party arguing that foreign law applies fails to establish an actual conflict between that law and Delaware's, the Court need not engage in any choice-of-law analysis and may apply Delaware law. *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. 06C-11-108, 2007 Del. Super. LEXIS 402 *29 (Del. Super. Ct. June 20, 2007). Here, Defendants fail to point to any conflict, let alone provide any expert declarations or case law proving one.[12] In fact, Defendants argue that *Delaware* law applies in their motion to dismiss the claims of Maxima's toddler grandchild. D.I. 13 at 3-4. Because Defendants fail to show that an actual conflict exists, Delaware law applies.[13]

Although Newmont tries to justify its conduct by reference to a purported "possessory defense," it is irrelevant on the facts here. Defendant's own expert establishes that only a *possessor* can rely on the "possessory defense" Newmont hides behind. D.I. 38-2, Ex. 11 ¶¶ 6-9. And at present, the highest Peruvian court to make a finding on possession has determined that Plaintiffs possess Tragadero Grande. D.I. 27 Ex. 42 at 8-9. This Court needs only to follow the Peruvian courts on this issue, in which case Peruvian law is irrelevant.

H. If this Court were to dismiss on FNC grounds, it must impose conditions.

Courts often condition FNC dismissal to ensure Plaintiffs are not prejudiced. Various

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from an opinion that simply states, without evidence, that American courts are likely to be more congested than those in "less litigious societies . . . like Peru." *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 552 (S.D.N.Y 2001). This dated conjecture is unconvincing. *See Bhatnagar*, 52 F.3d at 1230 (characterizing "one newspaper article, which includes anecdotal references to congestion in Indian courts," as "meager support").

[12] Instead, they merely state the truism that "to the extent that the substantive law governing the applicable theories of liability and damages in this case differ between Peru and Delaware, a true conflict *would* exist." D.I. 15 at 20 (emphasis added).

[13] Newmont cannot sandbag Plaintiffs by arguing on reply that an actual conflict exists. *See Paige v. City of New Brunswick*, 680 F. App'x 107, 110 n.4 (3d Cir. 2017) (explaining that "district courts . . . generally deem arguments made only in reply briefs to be forfeited.") (internal quotation omitted)).

conditions would be necessary here: (1) Dismissal must be conditioned on the Peruvian courts' actual "acceptance of jurisdiction"[14], *Warn v. M/Y Maridome*, 169 F.3d 625, 630 (9th Cir. 1999); this Court must resume jurisdiction otherwise. *Henderson v. Metro. Bank & Trust Co.,* 470 F. Supp. 2d 294, 304 (S.D.N.Y.2006).[15] (2) Defendants must waive "any statute of limitations defense that would not have been available had the court retained jurisdiction," *id.*; and (3) guarantee that any Peruvian judgment will be satisfied, *see id.* (4) Defendants must "translate needed English-language documents into Spanish." *Duha v. Agrium*, *Inc.*, 448 F.3d 867, 876 (6th Cir. 2006). (5) Defendants must submit to discovery under the Federal Rules, voluntarily produce documents within the United States pursuant to the Federal Rules, and authenticate such documents in whatever way Peruvian courts require. *Guimond v. Wyndham Hotels*, 95 Civ. 0428, 1996 U.S. Dist. LEXIS 7255, at *16 (S.D.N.Y. May 29, 1996); *see also Piper*, 454 U.S. at 257 n.25. Finally, (6) because access to interim relief is so critical, if this Court grants preliminary relief before considering this motion (as it should), it should also condition any dismissal on the preliminary relief remaining in effect during the litigation in Peru. Conversely, if the Court were to dismiss on FNC grounds without considering Plaintiffs' preliminary injunction motion (which it should not), it should allow Plaintiffs to "reapply for a preliminary injunction in [this District] if the [Peruvian] court does not decide [Plaintiffs'] application within 60 days after it is submitted." *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 829 (2d Cir. 1990).

V. CONCLUSION

Only by retaining its jurisdiction can this Court ensure that these Plaintiffs have their day in court. Defendants' motion should be denied.

Dated: December 4, 2017 Respectfully submitted,

/*s*/Misty A. Seemans

[14] Actual acceptance should be required because there is serious doubt that Peruvian courts would be willing or able to accept Defendants' stipulation. Ruiz Decl. ¶¶ 5-12.

[15] Failure to include a return jurisdiction clause is an abuse of discretion. *See Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 907 (5th Cir. 1997).

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CERTIFICATE OF SERVICE

I, Misty A. Seemans, hereby certify that on December 4, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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